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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID VILLARREAL,

Defendant and Appellant.

H046653

(Santa Benito County

Super. Ct. No. CR1201470)

In September 2013, defendant David Villareal pleaded no contest to assault by means likely to cause great bodily injury, a felony (Pen. Code, § 245, subd. (a)(4)),<sup>1</sup> and he admitted the special allegation that the crime was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A)). On November 7, 2013, the court suspended imposition of sentence and granted defendant felony probation for a term of five years. In February 2019, after the filing of a petition alleging defendant's violation of the terms of his probation and after a contested hearing, the court found that defendant had willfully violated the terms of his probation. The court terminated probation, and sentenced defendant to a four-year term for the assault conviction and a three-year consecutive sentence for the gang enhancement.

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<sup>1</sup> All further statutory references are to the Penal Code.

Defendant filed a timely notice of appeal, and we appointed counsel to represent him in this court. Appointed counsel has filed an opening brief that states the case and facts but raises no issue. We notified defendant of his right to submit written argument on his own behalf within 30 days. The 30-day period has elapsed and we have received no response from defendant.

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *People v. Kelly* (2006) 40 Cal.4th 106 (*Kelly*), we have reviewed the entire record. Following the California Supreme Court's direction, we provide "a brief description of the facts and procedural history of the case, the crimes of which the defendant was convicted, and the punishment imposed." (*Kelly, supra*, at p. 110.)

## **I. FACTUAL BACKGROUND**

### **A. Offense**

The facts underlying the offense concern an incident occurring in the early morning hours at an apartment complex in Hollister on September 22, 2012. A witness, Elaine, reported to responding officers that she had taken her two nonlocal friends, the victim (Fabian) and Cirrena, to a party at an apartment complex, where they drank beer in the parking lot. Elaine reported that persons who were " 'Eastsiders' " approached Fabian and asked "where he was from." Fabian told the police that he knew the people who approached him were members of the Norteño gang, and they asked him, " 'Do you bang?' " Elaine reported that after Fabian responded that he was from Newman, California, " 'they all jumped him,' " and multiple people punched and kicked him in the face and head and broke beer bottles over his head. Both Elaine and Fabian estimated that between 10 to 20 people attacked Fabian.

Defendant and four other individuals were apprehended by the police after fleeing the scene in a Dodge sedan. After the car stopped, three of the individuals exited and ran down an alley and then separated. One of them threw a handgun on the roof of a building

while fleeing. Upon its retrieval, the police determined that the handgun had two live rounds of ammunition and that one empty shell casing had been ejected.

Cirrena later participated in an in-field lineup and positively identified defendant as one of the persons involved in the attack and that he had “ ‘stomped’ on the victim’s face and kicked him from above several times.” Elaine declined to participate in an in-field lineup, “stating she knew the suspects and was afraid of them.”

### **B. Probation Violations**

On January 10, 2017, defendant appeared before the San Benito County Probation Department (Department) and signed a positive test admission form, wherein he stated he had tested positive for cocaine and opiates and he voluntarily admitted having used cocaine and beer. Defendant testified at the hearing that he had truthfully admitted the use of cocaine and opiates. Additionally, on December 17, 2018, defendant appeared before the Department and signed a positive test admission form stating that he had tested positive for cocaine and that he voluntarily admitted having used cocaine and alcohol. Defendant admitted at the hearing that he had a positive test in December 2018.

Defendant was scheduled to appear before the Department on July 26, 2017. He did not appear on that date, and he made no attempt to contact the supervising officer of the Department to reschedule the appointment. Defendant testified that he called his probation officer to reschedule the appointment and left voicemail messages but his calls were not returned.

The Department instructed defendant to complete the ACCI Life Skills workbook. He never complied with that directive.

## **II. PROCEDURAL BACKGROUND**

Defendant was charged by an amended two-count felony complaint on October 23, 2012, with assault by means likely to cause great bodily injury, a felony (§ 245, subd. (a)(4); count 1), and participation in a criminal street gang, a felony (§ 186.22, subd. (a); count 2). The amended complaint included special allegations that

in the commission of the assault, defendant inflicted grave bodily injury upon the victim (§ 12022.7, subd. (a)), and that the offense was committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)). An information was later filed on May 29, 2013, alleging the two counts and the special allegations previously alleged in the amended complaint; it included a specific reference in the gang enhancement to section 186.22, subdivision (b)(1)(C).

On September 26, 2013, defendant, pursuant to a negotiated plea agreement, pleaded no contest to the offense of assault by means likely to cause great bodily injury, and he admitted the gang allegation, as amended to refer to section 186.22, subdivision (b)(1)(A). The court found that defendant had knowingly and voluntarily waived his rights in entering the no contest plea, and the People and defendant stipulated there was a factual basis for the plea. The People moved to dismiss count 2, to strike the special allegations under section 12022.7, subdivision (a), and to amend the gang allegation to refer to subdivision (b)(1)(A) of section 186.22, which motions were granted by the court.

On November 7, 2013, the court suspended imposition of the sentence and granted defendant probation for a period of five years. The court gave defendant 740 days' credit for time served.

On or about August 24, 2017, a petition was filed pursuant to section 1203.3 alleging that defendant had violated the terms of his probation by failing to (1) report as directed, (2) abstain from using controlled substances, and (3) "enroll in and successfully complete ACCI at Home Study Guide as directed." On February 1, 2019,<sup>2</sup> after a contested hearing on the probation violation petition, the court sustained the allegations of the petition and revoked probation. The court sentenced defendant on count 1 to the

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<sup>2</sup> As recited by the court, after a notice to show cause was issued in 2017 and defendant failed to appear before the probation department in August 2017, he "then was in abscond status from August[] 2017 to December[] 2018."

upper term of four years, and it imposed a three-year consecutive term for the gang enhancement, for a total prison sentence of seven years. The court also granted defendant 480 days of custody credits and imposed fines and assessments, including a restitution fine of \$300.

Defendant filed a timely notice of appeal. In the appeal notice, defendant indicated the appeal was based upon “the sentence or other matters occurring after the plea that do not affect the validity of the plea.”<sup>3</sup>

### **III. DISCUSSION**

Having carefully reviewed the entire record, we conclude that there are no arguable issues on appeal. (*Wende, supra*, 25 Cal.3d at pp. 441-443.)

### **IV. DISPOSITION**

The judgment is affirmed.

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<sup>3</sup> After the filing of the notice of appeal, pursuant to defendant’s request, the court modified the judgment to reduce the restitution fine from \$300 to \$240, and to increase the custody credits awarded from 480 days to 836 days.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, Acting P.J.

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MIHARA, J.

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